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No. 91-921

Supreme Court, U. S.

FILED

JAN 16 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1991

ATUN, C.A.,

Petitioner,

v.

JANET LUCAS,

Respondent.

**On Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

REPLY BRIEF IN SUPPORT OF PETITION

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January 16, 1992

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REPLY BRIEF IN SUPPORT OF PETITION

The main thrust of the brief in opposition is that the questions presented by the petition are beyond the Court's power to address. Yet the Court has been specifically entrusted by Congress with the power to prescribe federal rules of procedure and has supervisory authority over the lower courts' application of such rules. Contrary to Respondent's claim, the Second and Ninth Circuits have construed Rule 4(j) in clearly contradictory ways. The Second Circuit has rejected the argument that, where a foreign defendant is amenable to service abroad under Rule 4(i), a plaintiff is free to serve that defendant at his leisure with no requirement of prompt service and no duty to show good cause for failing to initiate service efforts within the 120-day time limitation of Rule 4(j). The

Ninth Circuit, on the other hand, has held Rule 4(i) service to be free from any time constraints. Certiorari should be granted to resolve this conflict over the important question of how to construe Rule 4(j) and to maintain the federal policy of discouraging dilatory prosecution of lawsuits.

I. THE DECISION BELOW CANNOT BE DISTINGUISHED FROM CONFLICTING SECOND CIRCUIT AUTHORITY

Respondent asserts that there is no true conflict among the Circuits. Her attempt to distinguish the Second Circuit's decisions in *Montalbano v. EASCO Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985), and *Gordon v. Hunt*, 116 F.R.D. 313 (S.D.N.Y. 1987), *aff'd*, 835 F.2d 452 (2d Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988), from the decision below is based upon an interpretation of these cases not shared by any of the courts which have considered or applied them, including the Ninth Circuit.

In affirming a foreign defendant's dismissal, the *Montalbano* court noted that such dismissal was "in any event, conditional." 766 F.2d at 740. Respondent finds "implicit" in this obscure observation "a recognition that service in Japan under Rule 4(i) would be exempted from the Rule 4(j) strictures." Brief in Opposition at 3. The court appears to have been referring to the trial court order (reported earlier in the decision) which dismissed the claims against the defendant conditionally until service upon it had been perfected. See 766 F.2d at 739. This condition applies to every Rule 4(j) dismissal, since a dismissal under Rule 4(j) operates without prejudice.

Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure, 96 F.R.D. 81, 128 (1983).

Only when a complaint is filed at or near the expiration of the applicable statute of limitations does a Rule 4(j) dismissal bar the complaint from being refiled and served. That occurred here in the case of the domestic defendants, and it appears to have occurred in *Montalbano* as well.¹

Respondent's reading of *Montalbano* is not shared by the courts. The lower courts which have applied *Montalbano* have construed it as holding that the Rule 4(j) time limit applies where no service under Rule 4(i) had been attempted, nor more time sought for service, in the initial 120-day period. See *Aiken v. Tokai Shosen*, No. 89-7769, 1991 U.S. Dist. Lexis 371 (E.D. Pa. Jan. 9, 1991), reprinted at Pet. App. 21a-22a; *Shaw v. Rolex Watch U.S.A., Inc.*, 745 F. Supp. 982, 987 (S.D.N.Y. 1990); *Gordon v. Hunt*, 116 F.R.D. at 321.²

¹ *Montalbano* was an action to recover damages for personal injury brought in New York. Under New York law, the limitations period for actions of this kind is three years. N.Y. Civ. Prac. L. & R. § 214 (McKinney 1992). Since the injuries were alleged to have occurred on or about November 3, 1981 (766 F.2d at 738) and dismissal was affirmed on July 9, 1985 (*id.* at 737), refiling would have been time-barred.

² The decision below attempted to distinguish *Montalbano* on the ground that "no service had been effected anywhere at the time of the order of dismissal." App. A at 2a. The arbitrariness of this distinction has been discussed in the Petition at

Respondent would distinguish *Gordon v. Hunt* as a case concerned merely with "late domestic service in New York." Brief in Opposition at 3. Yet this case is an excellent illustration of what is wrong with the Ninth Circuit's overly literal interpretation of Rule 4(j) and how it creates unnecessary anomalies. In *Gordon v. Hunt*, the untimely served defendant was a citizen of Saudi Arabia who moved between residences in several countries. Unsuccessful Rule 4(i) service had been attempted on him in England, but ultimately he was served while visiting New York. Under Respondent's reasoning, the plaintiffs' crucial error was in serving him when they found him in the U.S. instead of waiting until they could serve him abroad and thus escape Rule 4(j)'s requirements that they show good cause for their delay.

Respondent incorrectly represents *Aiken* as being concerned merely with service under Rule 4(c) and not with service under Rule 4(i).³ There the plaintiff unsuccessfully attempted service abroad on a foreign defendant under Rule 4(c) within the initial-120-day period and, after it expired, asked for additional time to attempt

(Continued from previous page)

page 7. Tellingly, Respondent has made no attempt to defend the Ninth Circuit's reasoning.

³ Contrary to Respondent's representation, there is only one final order in the *Aiken* case, not two "somewhat contradictory" orders. Brief in Opposition at 3. The order, filed January 9, 1991, granted a motion for reconsideration and dismissed the complaint. It is reprinted in Appendix I to the Petition at 20a-24a. The order which was vacated is also reprinted because it contains statements of fact which the final order incorporates.

service under Rule 4(i). Since the efforts to serve under Rule 4(i) did not begin until after the expiration of the 120-day period, the court ordered dismissal. Pet. App. at 23a & n.2. Again, under Respondent's reasoning, it was the attempt at service which doomed the complaint. Had the plaintiff simply done nothing, he could have (according to Respondent) waited years before commencing any efforts to serve the complaint under Rule 4(i).

Other courts which have confronted the issue of whether Rule 4(j)'s good cause requirement applies to service on foreign defendants outside its 120-day period have reached the same result as the Second Circuit. See *Hilmon Company (V.I.) Inc. v. Hyatt International*, 899 F.2d 250 (3d Cir. 1990) (affirming Rule 4(j) dismissal of Panamanian corporation never served); *United States v. Ayer*, 857 F.2d 881 (1st Cir. 1988) (applying Rule 4(j) good cause standard to permit delayed service on foreign defendant). Respondent is silent on how these decisions can be reconciled with the decision below.

II. THE COURT SHOULD USE ITS SUPERVISORY POWER TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS CONCERNING THE CONSTRUCTION OF RULE 4(j)

Where, as here, a case concerns the construction and application of the Federal Rules of Civil Procedure, it is appropriate for the Court "to determine on the merits the issues presented and to formulate the necessary guidelines in this area." *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964). Respondent appears to admit the anomalies inherent in the Ninth Circuit's construction of Rule 4(j) but

claims the Court is powerless to address the issues which it raises because the language of the rule is "plain." However, since both the Second and Third Circuits have applied Rule 4(j) and reached an opposite result from the Ninth Circuit, there is good reason to conclude that the Ninth Circuit's construction of Rule 4(j) is neither plain nor clear and that the relationship between subdivisions (i) and (j) of Rule 4 is in need of clarification.⁴

An overly literal interpretation of the rule should not be permitted to defeat its basic purpose. Under the Rules Enabling Act, Congress has delegated to the Court broad power to prescribe federal rules of practice and procedure and to supervise the lower federal courts in their application. *See* 28 U.S.C. § 2072; *Frazier v. Heebe*, 482 U.S. 641, 646 (1987). In construing such rules, the Court is interpreting standards of its own making. Thus, unlike construction of a statute where the Court must, in deference to the separation of powers, attempt first to discern

⁴ Respondent also erroneously suggests that, because this case was heard by the Ninth Circuit on an interlocutory appeal under 28 U.S.C. § 1292(b), the questions for which the Court may grant review are circumscribed by the wording of the district court's certification order.

The court's jurisdiction is plenary in nature. *See Forsyth v. Hammond*, 166 U.S. 506, 511-13 (1897). It has broad discretionary power to frame and decide the issues it deems necessary to further the interests of justice. *See* R. Stern, E. Gresman, & S. Shapiro, *Supreme Court Practice* 364-65 (6th ed. 1986), *citing Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1983) (the Court may consider questions not specifically passed on by lower courts); *United States v. Leon*, 468 U.S. 897, 905 (1984) (the Court may base its decision on a theory not argued or briefed).

legislative intent, in interpreting a federal rule of procedure the Court need ask no more than what the rule is intended to accomplish.⁵

III. RULE 4(j) SHOULD NOT BE READ IN ISOLATION FROM THE REMAINDER OF RULE 4

The overly literal interpretation of Rule 4(j) advocated by Respondent and adopted by the decision below defeats the policies of prompt notice and avoidance of dilatory actions which the 1983 amendments to the Federal Rules were designed to promote. It reads Rule 4(j) in isolation from the remainder of Rule 4 and ignores history showing that Rule 4(j) was intended to implement Rule 4(a)'s requirement of prompt service.

In amending Rule 4 to shift the responsibility for service from the U.S. Marshal to private parties, the Court and Congress "adopt[ed] a policy of limiting the time to effect service." 128 Cong Rec. 30,931 (Dec. 15, 1982). Respondent argues that, since Rule 4(i) was left unchanged by the 1983 amendments, foreign service under Rule 4(i) was left unfettered by the time requirements newly imposed on domestic service.

This argument ignores the general precept of the 1983 amendments, stated in Rule 4(a), that the plaintiff be "*responsible for prompt service.*" (Emphasis supplied.) The 120-day limit stated in new subdivision (j) gives definite

⁵ See Bauer, *Schiavone: An Un-Fortun-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L. Rev. 720, 728 (1988).

content to Rule 4(a)'s requirement. As the Original Practice Commentary notes, the "foreign service" exception to Rule 4(j) does *not* exempt service made abroad under Rule 4(i) from the prompt service requirement of Rule 4(a). Fed. R. Civ. P. 4 Original Practice Commentaries § C4-34, *reprinted at* 28 U.S.C.A. Rule 4.⁶

The circuit courts are in agreement that the 120-day time limit imposed by Rule 4(j) is to be strictly applied.⁷ Where, as here, the court on its own motion issues an order to show cause under Rule 4(j) and no defendant has yet been served, cause must be shown as to each defendant. Since, absent good cause, dismissal is mandatory and hearing on the show-cause order is often *ex parte*, dismissal should not be forestalled simply because a plaintiff represents that a defendant is amenable to service under Rule 4(i). Rather, Rule 4(a)'s independent demand that a plaintiff make prompt service should

⁶ Respondent's observation that this paragraph of the Practice Commentary makes no reference to Rule 4(j) misses the point: When service is made abroad under Rule 4(i), the last sentence of Rule 4(j) creates a limited exception to the rebuttable presumption that service can and should be completed within 120 days of filing, but not from Rule 4(a)'s more general requirement of prompt service. Thus, where, as here, no effort whatsoever is made to serve until long after the 120-day period has passed and good cause for the delay cannot be shown, dismissal is required to effectuate the purpose of Rule 4.

⁷ See, e.g., *Frasca v. United States*, 921 F.2d 450, 452-53 (2d Cir. 1990); *Geiger v. Allen*, 850 F.2d 330, 331-32 (7th Cir. 1988); *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 84 (3d Cir. 1987), *cert. denied*, 484 U.S. 965 (1987); *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

require such a plaintiff to make some showing that steps have been taken to serve the defendant abroad under one of the methods authorized by Rule 4(i). Otherwise the utility of Rule 4(j) as a "tool for docket management"⁸ is severely diminished.

This construction of Rule 4(j) is supported by its drafting history. The Advisory Committee explained that Rule 4(j) "does not apply to *attempted service* in a foreign country pursuant to Rule 4(i)". Fed.R.Civ.P. 4 Advisory Committee's note (emphasis supplied). This implies that application of the exception should require some showing of an attempt at service.

Respondent asserts that Petitioner's reading of the Advisory Committee's note is "taken out of context and misleading" because the paragraph from which it is excerpted explains Rule 4(j) generally and alludes to the "gradual elimination of marshal service as rais[ing] new concerns about timeliness." *Id.* Yet as Rule 4(a) makes clear, these "new concerns about timeliness" apply equally to foreign and domestic service. Respondent points to nothing in Rule 4(j)'s history indicating an intent to shield plaintiffs from dismissal when service abroad has not even been attempted.

Respectfully submitted,

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⁸ *United States v. Ayer*, 857 F.2d at 885-86.